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No. 82-613

In the Supreme Court of the United States

October Term, 1982

John N. Robinson,
Petitioner,

vs.

George J. Magovern,
Cardiothoracic Surgical Associates, Inc.,
and Allegheny General Hospital,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

Brief In Opposition To Petition For Writ Of Certiorari of Respondent Allegheny General Hospital

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I. COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Should this Court review an evidentiary question on which all Courts of Appeals are in agreement?

2. Should this Court decide an issue that can have no effect on the ultimate decision in this case?

3. Should this Court consider a question that was never raised below and that assumes facts which are directly contrary to the detailed findings of fact reached by the trial court?

II. COUNTERSTATEMENT OF THE CASE

A. PROCEDURAL SUMMARY

Petitioner John Robinson, a thoracic surgeon, filed this action in 1977 alleging that Allegheny General Hospital ("Allegheny General" or "Hospital"), its trustees, and other individuals violated the Sherman Act, 15 U.S.C. §§1, 2, and deprived Dr. Robinson of his civil, constitutional, and common law rights by denying his request for staff privileges at Allegheny General. On Motion for Summary Judgment, the district court dismissed Dr. Robinson's claims under the Fifth and Fourteenth Amendments, the Civil Rights Act of 1871, and federal common law. *Robinson v. Magovern*, 456 F. Supp. 1000 (W.D. Pa. 1978). After a ten week, nonjury trial, the court issued a 193 page, factually dense memorandum opinion entering judgment in favor of all defendants on all remaining claims. *Robinson v. Magovern*, 521 F. Supp. 842 (W.D. Pa. 1981). The United States Court of Appeals for the Third Circuit affirmed. *Robinson v. Magovern*, No. 81-2726 (3rd Cir. May 11, 1982).

In his petition for writ of certiorari, Dr. Robinson does not challenge the district court's grant of summary judgment. Nor does he challenge any of the legal conclusions supporting the court's post-trial decision in favor of respondents. Dr. Robinson's sole contention before this Court is that five documents were improperly excluded from evidence. Dr. Robinson would have this Court review evidentiary rulings that had no effect on the outcome of the litigation. Furthermore, as will be demonstrated below, the issues raised by Dr. Robinson are neither substantial federal questions nor issues that have divided the courts of appeals. Accordingly, there is no reason for this Court to grant the petition for writ of certiorari.

B. FACTUAL SUMMARY

At all times relevant to this litigation, petitioner enjoyed medical staff privileges in at least twelve hospitals in the area of

Pittsburgh, Pennsylvania. (JX-11, Tr. 427-429; Tr. 565-69; Answers Nos. 1 & 2 to Allegheny General's First Set of Interrogatories)[1] In 1975 he inquired at Allegheny General about acquiring privileges there and was referred to the Director of the Department of Surgery, Dr. George Magovern. (30a)[2] The two met in April 1975, but after the interview Dr. Robinson left the Hospital without requesting an application form. (33a) No one at Allegheny General heard anything from Dr. Robinson for almost five months, at which time the Hospital received a belligerent demand letter from Dr. Robinson's attorney. (33-34a) The letter declared that Dr. Robinson's "several attempts to be favorably considered" for staff privileges had been "frustrated," and criticized the Hospital's alleged "failure to process my client's application to a just conclusion." Citing Dr. Robinson's "extensive damages," the attorney threatened legal action within fifteen days unless the Hospital indicated a desire to resolve the "problem." *(Id.)* Inasmuch as Dr. Robinson had never even filed an application for medical staff privileges at that point, the virulent quality of counsel's letter understandably dismayed the Hospital's chief administrator, and he immediately consulted with the Hospital's legal counsel. (34a; 179a)

The Hospital responded to petitioner's attorney by suggesting that Dr. Robinson write for an application. (34a; JX-1, Tr. 427, 429) Such a request was eventually received from Dr. Robinson, and the completed application was returned to the Hospital on behalf of Dr. Robinson by means of a cover letter from his attorney. (JX-1C, 1D, 1E, 1F, Tr. 427, 429; Tr. 502-03, 504-07)

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[1]All citations to the record specify the relevant exhibits or transcript pages. Joint Exhibits are designated as "JX" and are followed by citations to page numbers of the trial transcript at which each exhibit was offered into evidence and admitted by the judge. Supreme Court Rule 34.5. Citations to the trial transcript are designated as "Tr." References to the opinions below will include citations to petitioner's appendix.

[2]When citing to the findings of the district court or Third Circuit, respondent will refer to the appendix to the petition.

As Director of the Department of Surgery, Dr. Magovern recommended to the Hospital's Credentials Committee that the application be rejected. (JX-15, Tr. 427, 429) After considering the application, evaluative letters,[3] and Dr. Magovern's report, the Medical Staff Credentials and Executive Committees independently and unanimously recommended rejection. (JX-1UU, 3, 4, Tr. 427, 429) After providing Dr. Robinson with a copy of the Credentials Committee's report, the Hospital afforded Dr. Robinson a hearing at which his attorney was present and participated. (48-49a) Following the hearing, the Executive Committee again voted to deny privileges. (53a) After an independent review by a special committee, the Hospital's Board of Trustees adopted the unanimous recommendations and rejected Dr. Robinson's application. (53-54a) This suit followed.

C. EVIDENTIARY RULING

During the discovery phase of the litigation, respondents produced thousands of documents responsive to petitioner's requests. Only eight were withheld as protected by the attorney-client and work product privileges. When petitioner challenged these claims of privilege, the documents themselves, as well as supporting affidavits, were submitted by agreement of counsel to a magistrate for *in camera* inspection. After oral argument, the magistrate issued two opinions declaring all but one of the documents privileged.[4]

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[3]Petitioner would have this Court infer that his credentials are impeccable from the statement that he studied under the eminent Dr. Denton Cooley. In fact, Dr. Cooley's evaluation of petitioner's ability was decidedly negative. (JX-1RR, Tr. 427, 429) Dr. Cooley testified that he had never seen a resident in training who was more inept than Dr. Robinson. (Cooley Dep. at 94)

[4]The opinions and orders issued by Magistrate Sensenich are not included in the Appendix to the Petition for Writ of Certiorari. The opinions and orders issued December 17 and 18, 1979 and January 24, 1980 appear in the district court docket as documents numbered 223, 234, and 251, respectively.

On appeal from the magistrate's orders, the district court conducted a *de novo* review and another *in camera* inspection of the documents and supporting affidavits. (170a) Copies of the affidavits, with only minor deletions, were provided to Dr. Robinson by the court. Following an independent review of the documents themselves, as well as an extensive stipulation of facts and briefs in which counsel were free to refer to any portion of the record, the district court ruled that all eight documents were shielded by either the attorney-client or the work product privilege or both. (180-81a) With respect to documents protected by the work product privilege, the court heid that petitioner had not demonstrated sufficient need to overcome the privilege. (176-79a; 181a) Additionally, the court found insufficient evidence to warrant application of the crime-fraud exception to the attorney-client privilege.[5] (179a n.4)

As the petition for writ of certiorari demonstrates, petitioner was aware of the drafters, recipients and subject matter of each document. The principals were subjected to extensive cross-examination in discovery and during the course of the trial, and the matters discussed in the privileged documents were proven by alternate means. Through the trial and appeal, the district court and Third Circuit had access to the documents themselves and supporting affidavits.

III. SUMMARY OF ARGUMENT

Petitioner has argued that a writ of certiorari should issue for the following reasons:

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[5]Contrary to petitioner's suggestion (Petition at 13), Judge Snyder's ruling was made following the conclusion of discovery. His decision was distributed to the parties at the pretrial conference.

First, conflicts allegedly exist among the courts of appeals on the issues of the scope of the crime-fraud exception to the attorney-client privilege and of the evidentiary showing needed to trigger the exception. Second, the type of document subject to the work product privilege raises a substantial federal question.

The petition for writ of certiorari should be denied for the following reasons:

(1) *No conflict exists among the courts of appeals with respect to either the scope of the crime-fraud exception to the attorney-client privilege or the type of evidence required to employ the exception.* Contrary to petitioner's representation, federal appellate courts are not divided on the issue of the applicability of the crime-fraud exception to the attorney-client privilege to torts involving dishonesty. No case cited by petitioner restricted the scope of the exception to the tort of fraud. Similarly, the federal appellate courts agree that disputed documents may be inspected *in camera* to determine if the crime-fraud exception overcomes the privilege, and that is precisely what happened here.

(2) *The district court applied the evidentiary tests proposed by petitioner; therefore, this Court's adoption of the same tests would not affect the decision below.* Petitioner candidly concedes that the Third Circuit has long recognized the applicability of the crime-fraud exception to torts other than fraud. (Petition at 11) Accordingly, even if petitioner were able to demonstrate a conflict among the circuits, the question posed by this petition would be purely academic since the district court never questioned the fact that the exception could control in a case such as this. Indeed, respondents never argued otherwise.

Moreover, petitioner's suggestion that the crime-fraud exception should control whenever an *in camera* inspection of

the disputed documents demonstrates a connection between the legal advice and illegal activity is another nonissue, obviously concocted just for this Petition. In this case the district court conducted just such an inspection and found, based on the documents themselves, no evidence of a link between the advice sought and improper activity. However interesting the question posed by petitioner, its resolution in petitioner's favor would have absolutely no bearing on the outcome of this litigation. Merely theoretical questions are not the proper subject of petitions for writs of certiorari.

Similarly, petitioner's request that this Court answer the question left open in *Upjohn Co. v. United States*, 449 U.S. 383, 401 (1981), does not warrant granting the petition. The rule applied by the Third Circuit in *In re Grand Jury Investigation (Sun Co.)*, 599 F.2d 1224 (3rd Cir. 1979)—that the work product privilege can be overcome by a showing of necessity even though the evidence in question reveals legal theories and opinions—is the very standard suggested by the petitioner. The district court below followed *Sun Co.* but simply found the petitioner's proof of necessity wanting. Even if this Court were to agree with the Third Circuit's ruling in *Sun Co.* and the position advocated by petitioner, a decision adopting that standard would be of only academic interest in this case.

(3) *Petitioner may not ask this Court to decide a question that was not raised below.* In his petition for writ of certiorari, petitioner raises for the first time in this litigation the question whether the work product privilege can extend to documentary evidence directly involved in the litigation. This issue has never been briefed or argued by these parties. No factual determinations or legal conclusions have been made by the courts below, and this Court does not have the benefit of any judicial decision on the issue. Under these circumstances, this Court has made it clear that it will not reach out to decide an issue that was never before raised. *Hormel v. Helvering*, 312 U.S. 552 (1941).

IV. ARGUMENT

A. THE COURTS OF APPEALS AGREE, AND THE COURT BELOW FOUND, THAT THE CRIME-FRAUD EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE APPLIES TO TORTS OTHER THAN FRAUD

Petitioner's attempt to fabricate an issue relating to the scope of the crime-fraud exception to the attorney-client privilege is both flimsy and misleading. Contrary to petitioner's representation to this Court, the courts of appeals are, and have long been, in agreement on the scope of the crime-fraud exception. No court has held that the exception is limited to criminal activity or fraud. Furthermore, the district court in this case never questioned the theoretical application of the exception to the allegations of Dr. Robinson. As stated by the district court, "[A]lthough [Allegheny General] was advised by counsel during the application process and thereafter rendered an adverse decision, this is insufficient to establish that the attorney's advice was sought or given in furtherance of a crime *or tort*." (179a, emphasis supplied) The district judge went on to conclude that the petitioner had failed to introduce sufficient evidence to warrant application of the exception in this case.

Petitioner has represented to this Court that the courts of appeals have divided on the issue of the applicability of the crime-fraud exception to torts involving dishonesty or specific intent as opposed to "technical" fraud. In fact, a reading of the cases cited by petitioner as evidence of this conflict discloses no such disagreement. There is no conflict among the circuits for this Court to resolve.

None of the cases cited by petitioner stands for the proposition that the crime-fraud exception is restricted in its application to criminal or fraudulent acts. Two of the opinions, including the Third Circuit decision followed by the district

court in this case, expressly hold that the exception governs if the client seeks the attorney's advice in furtherance of any future or continuing illegal activity. *In re Sealed Case*, 676 F.2d 793, 812 (D.C. Cir. 1982) ("misconduct fundamentally inconsistent with the basic premises of the adversary system); *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 802 (3d Cir. 1979) ("continuing or future crime or tort") (cited by the district court).

The most that can be said for the remaining cases cited by petitioner is that the appellate courts used less broad language than the Third or D.C. Circuits in describing the general dimensions of the exception. In each instance, however, the court's language is mere dictum; the ultimate decision never turned on the applicability of the exception to torts other than fraud. In *United States v. Mardian*, 546 F.2d 973 (D.C. Cir. 1976), for example, the illegal activity in question was clearly criminal in nature; the defendant had been convicted of conspiracy under 18 U.S.C. §371 (1970). In this context, the court held that the exception governed communications "in furtherance of a crime or fraud." *United States v. Mardian*, 546 F.2d. at 982. The Court's definition was sufficiently broad to embrace the relevant activity and certainly did not have the effect of excluding nonfraudulent illegal activity.[6]

Similarly, in *In re Sawyer*, 229 F.2d 805, 808-09 (7th Cir.), *cert. denied*, 351 U.S. 966 (1956), the court's description of the exception as applying to "criminal or fraudulent act[s]" was incidental to its holding that the exception could be employed in both criminal and civil cases. The actual activity complained

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[6]In a later case, the D.C. Circuit clearly held that the exception extends to all activity inconsistent with the basic premises of the adversary system. *In re* Sealed Case, 676 F.2d 793, 812 (D.C. Cir. 1982). Even if it could fairly be said that the D.C. Circuit caused a rift in *Mardian*, the rift has been bridged by that court's own subsequent decision. This Court has made it clear that it does not sit to resolve intracircuit conflicts. Davis v. United States, 417 U.S. 333, 340 (1974).

of, a bribe of a public official, was patently criminal in nature. The court did not decide the issue that petitioner posits in this case.

The final case cited by petitioner as indicative of a conflict among the courts of appeals is a case dealing not with the scope of the exception but with the existence of the exception in the context of the work product privilege. *In re Murphy*, 560 F.2d 326 (8th Cir. 1977). Even in this context, however, the Eighth Circuit's general description of the exception is broader than petitioner would have this Court believe. As described by the Eighth Circuit, the exception overcomes the claim of privilege whenever the client planned to engage in "*illegal* or fraudulent activity." *Id.* at 337 (emphasis supplied).

The conflict that petitioner posits is in fact no conflict at all. Petitioner can point to no appellate decision squarely holding that the crime-fraud exception is limited to criminal or fraudulent acts. The only language that petitioner can cite as implying such a holding is pure dictum. Inconsistency in dicta has never been grounds for exercises of this Court's jurisdiction. *E.g., Sanchez v. Borras*, 283 U.S. 798 (1931); *Wisconsin Electric Co. v. Dunmore Co.*, 282 U.S. 813 (1931) (writ of certiorari dismissed as improvidently granted when alleged conflict did not materialize). See also R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 264 (5th ed. 1978).

Even if a conflict among the circuits existed, a writ of certiorari should not issue where, as here, the conflict is not central to the resolution of the case. As petitioner concedes, the Third Circuit has adopted, and the district court applied, the rule of law most favorable to him. (Petition at 11) The Third Circuit has expressly held that the exception governs cases involving misconduct other than fraud. *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d at 802 (3d Cir. 1979). The district court never questioned the availability of the exception, but merely concluded that, under the facts of this case, the privilege rather than the exception controlled.

The very rule that petitioner advocates, then, was applied in this case. This Court can afford him no further relief. As applied to petitioner, the supposed split among the circuits is of mere academic interest. As this Court held in *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959): "While this Court decides questions of public importance, it decides them in the context of meaningful litigation. . . . Resolution here of the. . . [issue in conflict] can await a day when the issue is posed less abstractly."

Because the proffered conflict among the courts of appeals does not exist and because a resolution of slightly inconsistent dicta would have no effect on this litigation, a writ of certiorari should not issue on the question of the scope of the crime-fraud exception to the attorney-client privilege.

B. THE ISSUE OF WHAT TYPE OF EVIDENCE SUFFICES TO TRIGGER THE CRIME-FRAUD EXCEPTION IS PURELY ACADEMIC AND DOES NOT DIVIDE THE COURTS OF APPEALS

Like the issue of the scope of the crime-fraud exception, the question of the evidentiary showing needed to trigger the exception is of no relevance to this case. Petitioner advocates adoption of a rule permitting the district court to base its decision on an *in camera* inspection of the documents. Just such an inspection was held in this case. By agreement of the parties, the documents and supporting affidavits were submitted to a magistrate. (170a) When the magistrate ruled, based on the *in camera* inspection of the documents, that the attorney-client and work product privileges shielded all but one of the documents from discovery, the petitioner appealed to the district court. After a second *in camera* inspection and *de novo* review, the district judge held:

> What the record reveals is that [Allegheny General] contacted counsel in response to litigation indicated by Robinson, even before Robinson complied with formal

> application procedures. Although [Allegheny General] was advised by counsel during the application process and thereafter rendered an adverse decision, this is insufficient to establish that the attorney's advice was sought or given in furtherance of a crime or tort. Plaintiff has not offered any evidence which would so indicate.

(179a)

The district court's ruling, following an independent review of the documents themselves, comported with the Third Circuit's decision in *FMC Corp.* Contrary to the petitioner's representation that *FMC Corp.* requires a showing separate from the documents themselves of some nexus between the legal advice sought and continuing illegal activity, the Third Circuit held in *FMC Corp.* that the disputed documents could be used to establish the required prima facie case. *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d at 803 & n.6. Consequently, petitioner benefitted from the very standard that he would have this Court apply. The petition for writ of certiorari, then, is no more than a request that this Court engage in a decisionmaking process that can be of no import to this petitioner.

This Court has long admonished parties not to seek review of issues that are merely academic or episodic. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955). The Court's reluctance to exercise its discretionary jurisdiction to decide issues of no practical import is particularly judicious in cases involving evidentiary privileges. As this Court noted in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), such cases are particularly unsuited to the development of broad principles. There, the Court narrowed its holding, writing:

> Needless to say, we decide only the case before us, and do not undertake to draft a set of rules.... Any such approach would violate the spirit of Federal Rule of Evidence 501. See S. Rep. No. 93-1277, p. 13 (1974) ("the

> recognition of a privilege based on a confidential relationship...should be determined on a case-by-case basis")..... While such a "case-by-case" basis may to some slight extent undermine desirable certainty in the boundaries of the attorney-client privilege, it obeys the spirit of the Rules.

Id. at 396-97 (citations omitted).

This Court should not address the evidentiary question posed by petitioner because it is not a concrete issue in this litigation and because the courts of appeals are not currently divided on this issue. Petitioner has cited a single opinion from the Ninth Circuit for the proposition that evidence other than the disputed documents themselves must support an application of the crime-fraud exception. *United States v. Shewfelt*, 455 F.2d 836 (9th Cir.), *cert. denied*, 406 U.S. 944 (1972). The *Shewfelt* opinion was based on a misreading of the law at the time of decision and has been abandoned by the Ninth Circuit in subsequent cases. Therefore, it does not support petitioner's argument that a division among the courts of appeals currently exists that requires this Court's attention.

The *Shewfelt* decision was reached without discussion or analysis. The Ninth Circuit simply cited several cases after its conclusory statement that a prima facie case must be built on independent evidence. *Id.* at 840. None of the decisions cited in *Shewfelt*, however, supports the holding of the court. *See Union Camp Corp. v. Lewis*, 385 F.2d 143, 144 (4th Cir. 1967); *United States v. Bob*, 106 F.2d 37, 40 (2d Cir. 1939).

As one federal court has recently noted, the Ninth Circuit appears to have abandoned the *Shewfelt* independent evidence test. *United States v. King*, 536 F. Supp. 253, 262 (C.D. Calif. 1982). In the ten-year period since *Shewfelt* was decided, the Ninth Circuit has never required a prima facie showing by independent evidence. Instead, during that period, the Ninth Circuit has reaffirmed its earlier decision in *United States v.*

Friedman, 445 F.2d 1076 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971), in which the court looked to the disputed document to determine the applicability of the crime-fraud exception. *See United States v. Hodge and Zweig*, 548 F.2d 1347, 1354-55 (9th Cir. 1977). The vitality of *Shewfelt*, then, is openly questioned within the Ninth Circuit and certainly does not support petitioner's suggestion to this Court that a conflict currently exists.

Every other Court of Appeals to address the issue has concluded that it is proper to inspect the disputed documents *in camera* and to use them in determining whether a prima facie case of abuse is present. *In re Sealed Case*, 676 F.2d at 815; *In re Berkley & Co.*, 629 F.2d 548, 553 & n.9 (8th Cir. 1980); *In re Special September 1978 Grand Jury*, 619 F.2d 1022, 1027-28 (7th Cir. 1980); *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d at 803; *In re Fish & Neave*, 519 F.2d 116 (8th Cir. 1975). Thus, except for an isolated case which is open to question, the courts of appeals agree that disputed documents may establish a prima facie showing of illegal activity. The courts of appeals are not currently divided on this issue; resolution of the issue by this Court, then, will not quiet any serious dispute among the circuits. Nor can a decision have any practical effect in this case since application of the standard most favorable to petitioner will only affirm the district court's decision.

For similar reasons, this Court should deny petitioner's request to decide an issue left open in *Upjohn Co. v. United States*, 449 U.S. at 401 (1981), and not squarely presented in this case. In *Upjohn*, this Court declined to decide what demonstration of need, if any, would overcome the work product privilege for documents disclosing attorney thought processes. The Court did indicate, however, that if any showing of need would suffice, it would be a "far stronger showing of necessity and unavailability by other means" than the substantial need and undue hardship test of Rule 26(b)(3). *Id.* at 401-02. It was

just a test that the Third Circuit adopted in *Sun Co.* and the district court applied in this case.

With respect to the five documents challenged by petitioner, the district court concluded that four disclosed attorney thought processes and were protected by the work product privilege. (176-79a; 181a) Of these four, three were also shielded by the attorney-client privilege, which cannot be overcome by a showing of need. (*Id.*) In discussing the single document that was shielded only by the work product privilege, the district court expressly found that petitioner made *no* showing of need. (178a; 181a) The Third Circuit found no error with this finding. (183a)

Having failed to demonstrate any necessity for the information contained in the single document protected by the work product privilege alone, petitioner cannot be permitted to argue to this Court that some abstract level of harm is sufficient to overcome the privilege. Even if this Court were to answer the question left open in *Upjohn*, it is clear that the Court would require, at a minimum, a showing of need greater than that specified in Rule 26(b)(3). Petitioner in this case, however, has utterly failed to establish a level of harm that would satisfy even Rule 26(b)(3). Under these circumstances, there is no reason for this Court to decide the question deliberately left unanswered in *Upjohn*.

C. PETITIONER NEVER ARGUED IN THE COURTS BELOW THAT THE WORK PRODUCT PRIVILEGE DOES NOT SHIELD DOCUMENTARY EVIDENCE INVOLVED IN THE LITIGATION

For the first time in this proceeding, petitioner has suggested that the contested documents were not shielded by the work product privilege because they were directly involved in the litigation. It is not surprising that the petitioner's argument to this Court is brusque and underdeveloped. Such an argu-

ment must be predicated on record evidence and factual findings. Having failed to develop any factual basis for his contention, petitioner is forced to urge this Court to decide this issue in a vacuum because it is, in petitioner's words, a matter of "frequent tension between...a client and...his attorney." (Petition at 15)

This unsupported statement hardly justifies an exception to this Court's general rule that it will not exercise its discretionary jurisdiction to consider an issue that was waived in earlier stages of a proceeding. The Court's position reflects the prudential concern that issues raised for the first time before this Court will lack properly developed factual foundations. Moreover, this Court would be forced, in considering such an issue, to evaluate the parties' arguments without the benefit of earlier judicial decisions focusing relevant points more precisely. As this Court stated in *Hormel v. Helvering*, 312 U.S. 552, 556 (1941):

> [O]ur procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.

These concerns, coupled with the Court's reluctance to decide broad evidentiary issues without concrete factual backgrounds, militate against granting the petition. Petitioner has suggested no reason for the Court to disregard its well established rule against deciding issues presented for the first time on appeal. Consequently, the petition for writ of certiorari should be denied.

V. CONCLUSION

For the reasons set forth, Allegheny General Hospital respectfully requests that this Court deny John N. Robinson's Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari of Respondent Allegheny General Hospital were served this 13th day of October, 1982, on counsel for all parties of record by depositing the same in the United States Mail, First Class, postage prepaid as follows:

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